NO. 89-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL POSTERS, INC., AND NATIONAL LITHO, A DIVISION OF NATIONAL POSTERS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE MASTER PRINTERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Suite 1500—North Lobby
Washington, D.C. 20004-1703
(202) 637-3058

FRANCIS T. COLEMAN*
MARK D. NELSON
KECK, MAHIN & CATE
1201 New York Avenue, N.W.
Penthouse
Washington, D.C. 20005
(202) 789-3400

Date: February 16, 1990

Attorneys for Amici Curiae
**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTORY PROVISIONS

The following provisions are pertinent to this case:

29 U.S.C. § 157 provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

29 U.S.C. § 158(a)(5) provides:

> It shall be an unfair labor practice for an employer — (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) in this title.

29 U.S.C. § 159 provides in pertinent part:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:
>
> * * * *
>
> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board
>
> > (B)(a) . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

29 U.S.C. § 160(c) provides in pertinent part:

> The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument.

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . .

29 U.S.C. § 160(e) provides in pertinent part:

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board.

29 U.S.C. § 160(f) provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith trans-

> mitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; . . .

RULE 37 STATEMENT

Pursuant to Rule 37 of this Court, the *amici curiae* have requested and received the written consent of the parties to file the attached brief in support of the petition for certiorari.

INTERESTS OF THE AMICI CURIAE

The *amici curiae* represent over 21,000 employers across the nation who may be adversely affected by the Fourth Circuit Court of Appeals' erroneous enforcement of a National Labor Relations Board bargaining order despite changed circumstances resulting from the Board's own unexcused delay which compel denial of enforcement.

The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of over 13,000 companies, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. The NAM is affiliated with 158,000 additional businesses through its Associations Council and National Industrial Council. The NAM and these councils provide information and other educational services and publi-

cations to employers regarding employer-employee relations and the laws and legislative proposals that pertain to them.

The Master Printers of America ("MPA") is a division of Printing Industries of America, an international not-for-profit trade association, representing commercial printing establishments in the graphic arts industry throughout the U.S. and Canada. MPA itself represents approximately 8,500 members, whose employee work forces are either wholly or partially non-union. MPA is dedicated to serving these members through the development of positive employee relations programs, and making these programs available to its members.

The Fourth Circuit's enforcement of a bargaining order in the face of a significant passage of time and dramatic growth and changes in the voting unit will have a substantial adverse impact on the members of the *amici* organizations. The court's ruling, that an eight-year delay and massive change in the voting unit need not be considered in reviewing a bargaining order, denies the employees of the *amici's* members their right to a representative of their choice under similar circumstances. Moreover, the court's refusal to consider the effect of the delay caused by the Board effectively condones dilatory conduct by the Board, to the detriment of the *amici's* members and their employees. Therefore, the *amici curiae* urge this Court to reject the Fourth Circuit's erroneous enforcement of the Board's bargaining order and require the Board to adopt a consistent and equitable standard for its bargaining orders which effectuates the right of employees to select, or refrain from selecting, a representative.

STATEMENT OF CASE

More than eight years ago, Local 61 of the Baltimore Printing Pressman and Assistants Union ("Union") narrowly won a contested election among fifty-five employees of National Posters, Inc., and National Litho ("employer"). The Regional Director for Region 5 of the National Labor Relations Board dismissed the employer's challenge to a voter ballot and objections regarding material union misrepresentations without a hearing, and certified the union as the representative of employees.

The employer refused to bargain in order to contest the validity of the certification. The Board issued a bargaining order and the employer requested review by the United States Court of Appeals for the Fourth Circuit. The court agreed with the employer that the Board improperly failed to hold a hearing on the challenged ballot.

More than three years after the election, an administrative law judge conducted a hearing on the challenged ballot and ruled the ballot should be counted. The employer filed exceptions to the judge's decision and for two and one-half years the Board failed to rule on these exceptions or the judge's decision. Then, without any explanation for its considerable delay, the Board affirmed the judge's ruling. The Board reopened the record, however, and required a second hearing because the petitioning Union had, in the interim, reaffiliated with a new international union. The Board later concluded that the changes in the union were insufficient in and of themselves to raise a new question concerning representation.

The employer filed a Motion to Reopen the Record or for Reconsideration in order to present evidence of the dramatic expansion of and change in the bargaining unit in light of the Board's decision in *St. Regis Paper Co.*, 285 NLRB No. 39 (1987). The bargaining unit had expanded from the original 55 employees to 137 employees, and only 37 of these employ-

ees were employed at the time of the election. Moreover, 18 of the original 55 employees had left the employer. The Board refused to consider the effect of these changed circumstances and ordered the employer to bargain with the Union.

The Fourth Circuit refused to set aside the Board's bargaining order in spite of the employer's argument regarding the challenged ballot, the union's new affiliation and the significant delay caused by the Board. Moreover, the court ratified the Board's refusal even to consider the massive changes in the voting unit in determining whether a bargaining order was justified.

REASONS FOR GRANTING THE WRIT

I. The Petition for Certiorari Should be Granted Because the Fourth Circuit's Decision Would Impose a Representative Upon Employees for a Considerable Period of Time, Without Their Consent.

This case touches at the very core of the National Labor Relations Act ("Act"). Section 7 of the Act guarantees employees two fundamental rights: the right to select a representative and the right to refrain from selecting a representative.[1] These rights are not effectuated, but are diminished, by imposing a bargaining representative upon employees where the bargaining unit increased in size by almost 300%, where less than one-third of the current employees were employed at the time of the election, and where the election itself was held eight years ago.

---

[1] Section 7 of the Act, 29 U.S.C. § 157 (1982), states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for mutual aid and or protection, and shall also have the right to refrain from any or all of such activities. . . .

If the Fourth Circuit's decision is not reversed, the employer's employees will be subjected to a union representative they did not choose, for up to four years.[2] This four-year denial of the right to vote on a representative contravenes the Act's preeminent concern with employee free choice. The Board must not be permitted to cause extensive delays with impunity. The eight-year delay in this case is directly attributable to the Board's conduct: its failure to hold a hearing on a challenged ballot and a two and one-half year period during which the Board apparently ignored this case. If the Board is not required to adopt a standard for issuing bargaining orders that gives proper consideration to changed circumstances, such as a significant passage of time and dramatic change in the employee unit, the Section 7 rights of employees will be denied and Board-sponsored delay will be condoned.

II. The Petition for Certiorari Should be Granted so That This Court Can Resolve a Conflict Among the Circuits Regarding the Appropriate Standard for Enforcing Bargaining Orders of the National Labor Relations Board in Light of Substantial Delay And Other Compelling Changed Circumstances.

The Board's decision below ignores its own prior holding in *St. Regis Paper Company* as well as the decisions of numerous courts of appeals, which have held that the passage of time, employee turnover or other changed circumstances may render a bargaining order improper. As further discussed below, the Fourth Circuit erred because it failed to require the Board to follow its own precedent and consider the appropriateness of its bargaining order in the face of the significant passage of time and dramatic expansion and turnover in the unit. In so holding, the court ignored the decisions of at least six other circuits. Further, the court's decision sabotages the

---

[2] The union has an irrebuttable presumption of majority status for one year. If the employer and the union enter into a collective bargaining agreement near the end of this one-year period, an election is barred for the term of the contract, up to an additional three years.

fundamental right of employees to select or refrain from selecting a representative of their own choosing. Instead, the Fourth Circuit forces a union upon employees.

Numerous circuits and the Board itself have recognized that bargaining orders are not automatically the appropriate remedy for an employer's refusal to bargain. However, inconsistent standards have been applied for enforcement of bargaining orders depending upon the genesis of the Board's order. This Court should clarify that a bargaining order, regardless of its original justification, can trammel the Section 7 rights of employees where significant delay and massive turnover and change in the bargaining unit have occurred.

The Fourth Circuit erroneously refused to apply principles of equity in reviewing the Board's order. The court mistakenly relied on this Court's holding in *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986), to create a new standard for reviewing Board bargaining orders. This new standard is wrong: it fails to apply principles of equity and conflicts with the decisions of this Court and the other circuits that have considered the issue. As discussed in greater detail below, the court's new standard is improper. The continued application of equitable principles is essential to ensure that employees' Section 7 rights are effectuated.

A. The Court Below, in Conflict with the Decisions of Other Circuits, Allowed the Board to Ignore the Unreasonable Passage of Time, Dramatic Change in the Bargaining Unit and Other Factors, and Enforced a Bargaining Order That is Not Appropriate.

Numerous courts of appeals have held that the Board must consider substantial passage of time, employee turnover or changed circumstances in determining whether a bargaining order is an appropriate remedy. Contrary to the Fourth Circuit, at least six circuits have refused to enforce Board bargaining orders where a substantial passage of time, dramatic changes or turnover in the bargaining unit, or other significant factors were

present, because to do so would violate the Act's guarantee that employees will be able to choose or reject representation. *See NLRB v. Triplex Manufacturing Co.,* 701 F.2d 703 (7th Cir. 1983); *Mosey Mfg. Co. v. NLRB,* 701 F.2d 610 (7th Cir. 1983); *NLRB v. Connecticut Foundry Co.,* 688 F.2d 871 (2nd Cir. 1983); *NLRB v. H.P. Hood, Inc.,* 496 F.2d 515 (1st Cir. 1974); *NLRB v. American Cable Systems,* 427 F.2d 446 (5th Cir)., *cert. denied,* 400 U.S. 957 (1970); *Clark's Gamble Corp. v. NLRB,* 422 F.2d 845 (6th Cir.), *cert. denied,* 400 U.S. 868 (1970); *Peoples Gas System, v. NLRB,* 629 F.2d 35 (D.C. Cir. 1980).

In *NLRB v. Triplex Mfg. Co.,* 701 F.2d 703 (7th Cir. 1983), the union narrowly won an election in a small unit. The Board certified the results despite the employer's allegations of improper union conduct during the election campaign. Three years after the election, the Seventh Circuit refused to enforce the Board's bargaining order because "due to [the] substantial employee turnover in this relatively small unit, there is a serious question whether a majority of current employees desires representation by the Union." *Triplex Mfg. Co.,* 701 F.2d at 709. To the contrary, the Fourth Circuit in this case ignored the substantial employee turnover in an expanding unit, the substantial delay after the election, and the narrow union victory in a small unit and enforced the bargaining order.

The Seventh Circuit also refused to enforce a Board bargaining order because of significant delay attributable to the Board. In *NLRB v. Mosey Mfg. Co.,* 701 F.2d 610 (7th Cir. 1983), the Seventh Circuit considered the Board's application for enforcement of a bargaining order. The court noted that five years had passed since the election and the delay was caused by the Board's indecision on what standard it should apply to misrepresentations during election campaigns. The court concluded that equity compelled denial of the Board's application for enforcement, stating:

> When a party asking a court to do equity has strung out the proceeding to the point where the court cannot determine whether equitable relief would achieve the legitimate purposes of the suit, which in this case is to give a unit of Mosey's workers the collective bargaining representative of their choice, the court will withhold its assistance. (Citations omitted). The best protection for these workers' freedom of choice would be a prompt new election, which a remand will not accomplish.

Mosey Mfg. Co., 701 F.2d at 613.

While the delay in the case below was substantially longer than the delay in *Mosey* and was also caused by the Board, the Fourth Circuit nevertheless ignored the delay and the contrary ruling in *Mosey*, and enforced the Board's order.

In *NLRB v. H.P. Hood, Inc.*, 496 F.2d 515 (1st Cir. 1974), the employer refused to bargain with the union for the purpose of contesting the validity of the union's certification. While the First Circuit affirmed the Board's conclusion that the employer unlawfully refused to bargain, the court refused to enforce the Board's bargaining order based on the five and one-half year delay since the election. The court stated:

> Even though we have upheld the Board, we think that under the circumstances the Board should have the opportunity prior to outright enforcement of the bargaining order to consider whether entry of the order remains appropriate. . . . While this means an additional lapse of time in these already hoary proceedings, we think fairness will be better served than by immediately locking the parties into a lengthy relationship on the basis of ancient events (footnote omitted).

H.P. Hood, Inc., 496 F.2d at 520.

The Fourth Circuit's decision below also conflicts with this ruling because the Fourth Circuit fails to consider the effect of an even greater passage of time on the propriety of a bargaining order.

In *NLRB v. Connecticut Foundry Co.*, 688 F.2d 871 (2d Cir. 1982), the court refused to enforce a Board bargaining order, citing the four years that had passed since the election and the court's doubt of whether the union still had the support of a majority of the employees. In deciding that "the equitable principles which govern judicial action" require denial of enforcement, the court cited its decision in *NLRB v. Nixon Gear*, 649 F.2d 906, 914 (2d Cir. 1981):

> Other factors also encourage us to avoid any further delay in the disposition of this proceeding. The Union's election victory was very narrow, the labor force at the Company has undoubtedly changed since the election, and there is no way of knowing at this time if the Union enjoys a majority of support.

Connecticut Foundry, 688 F.2d at 881.

Again, the Fourth Circuit's failure to deny enforcement of a bargaining order following eight years of delay directly conflicts with the decision of another circuit.

The D.C. Circuit's decision in *Peoples Gas System v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980) also directly contradicts the Fourth Circuit's ruling. There, the court refused to enforce a bargaining order in light of a five and one-half year delay caused by the Board. The court stated:

> One of the fundamental rights under the Act which the Board is charged with protecting is employees' right to choose their bargaining representative, as well as the "right to refrain" from collective bargaining. (Footnote omitted). Those rights are unjustifiably compromised by the remedy here. We would be far more receptive to the Board's request for enforcement had its decision reflected any balancing of the competing considerations which surface so dramatically on this record; a balancing which is an essential component of any valid exercise of discretion.

Peoples Gas, 629 F.2d at 45.

Not only does the Fourth Circuit's decision conflict with the decisions of other circuits in refusing to consider signifi-

cantly changed circumstances, but it also relied on the erroneous presumption that strike replacement employees support the union in the same ratio as those replaced. *National Posters, Inc. v. NLRB,* 885 F.2d 175, 181 (4th Cir. 1989), citing *Universal Security Instruments v. NLRB,* 649 F.2d 247 (4th Cir. 1981). This presumption has been expressly rejected by the Board and the Fifth Circuit. *Buckley Broadcasting Corp.,* 284 NLRB No. 113 (1987); *Curtin Matheson Scientific v. NLRB,* 859 F.2d 362 (5th Cir. 1988), *cert. granted,* 109 S.Ct. 3212 (1989). Thus, the court's refusal to consider dramatic employee turnover as a basis for refusing to enforce a bargaining order conflicts with the decisions of other circuits and current Board law.

B. The Court Should Resolve the Conflict Among the Circuits and Require the Labor Board to Adopt a Consistent and Equitable Standard to Apply To Bargaining Orders.

There is an apparent diversity of views among the different circuits with regard to the enforcement of Board bargaining orders. One standard apparently exists where the employer has engaged in pervasive improper conduct which prevented the holding of a fair election ("*Gissel*" bargaining orders). Another standard is applied by some courts where the employer's only unfair labor practice was its refusal to bargain (which was generally for the purpose of contesting the union's certification).

In the *Gissel*-type cases, bargaining orders have been frequently denied where there has been a significant passage of time or employee turnover which created a doubt as to the union's majority status. *NLRB v. Amber Delivery Service,* 651 F.2d 57 (1st Cir. 1981); *NLRB v. J. Coty Messenger Service,* 763 F.2d 92 (2d Cir. 1985); *NLRB v. Greensboro News & Record,* 843 F.2d 795 (4th Cir. 1988); *NLRB v. American Cable Systems,* 427 F.2d 446 (5th Cir.), *cert. denied,* 400 U.S. 957 (1970); *Clark's Gamble Corp. v. NLRB,* 422 F.2d 845 (6th Cir.), *cert. denied,* 400 U.S. 868 (1970); *NLRB v. Western*

Drug, 600 F.2d 1234 (9th Cir. 1979); *NLRB v. Ship Shape Maintenance Co.*, 474 F.2d 434 (D.C. Cir. 1972). The courts denied enforcement of bargaining orders in each case because enforcement would have violated the employees' Section 7 rights.

In *NLRB v. Knogo Corp.*, 727 F.2d 55 (2d Cir. 1984), the court succinctly stated the justification for refusing to enforce a bargaining order despite pervasive employer unfair labor practices:

> [A] bargaining order is a drastic remedy, jusitified "only when an election is unlikely to reflect the uncoerced preference of the bargaining unit" .... Thus, even where "hallmark" violations have occurred, a bargaining order may not be appropriate where "significant mitigating circumstances exist" .... Among the possibly mitigating factors the NLRB was obliged to consider were the passage of time and rate of employee turnover since the time of the violations .... We have constantly held that when there has been a large turnover in employees between unfair labor practices and a Board's order, "[t]he effect of a bargaining order could thus easily be to impose upon the employees a union not desired by the majority of them." (Citations omitted).

NLRB v. Knogo Corp., 727 F.2d at 60.

This logic for refusing to enforce *Gissel* bargaining orders should apply equally where, as in this case, bargaining orders are issued based solely on the employer's refusal to bargain with a certified union following an election. In both situations the "effect of a bargaining order could easily be to impose upon the employees a union not desired by a majority of them." *Knogo Corp., Id.*

Some courts have applied a *stricter* standard in non-*Gissel* cases and refused to consider the passage of time or employee turnover. *See Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180 (2d Cir. 1989); *NLRB v. Star Color Plate Service*, 843 F.2d 1507 (2d Cir.), *cert. denied*, 109 S.Ct. U.S. 81 (1988); *NLRB v. Parents and Friends*, 879 F.2d 1442 (7th Cir. 1989). To the

contrary, other courts have denied enforcement in non-*Gissel* cases based on the passage of time and employee turnover. *NLRB v. Triplex Mfg. Co.*, 710 F.2d 703 (7th Cir. 1983); *Peoples Gas System v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980); *NLRB v. Nixon Gear*, 649 F.2d 906 (2d Cir. 1981). It is inequitable and contrary to the rights of employees under the Act to apply a more stringent standard to bargaining orders where an employer has not committed egregious unfair labor practices but has only refused to bargain. Where there is a significant passage of time and dramatic employee turnover, enforcement of a bargaining order either is or is not appropriate without regard to the underlying basis for the order. To assure employees the fullest freedom to select their own bargaining representative, mitigating factors such as the passage of time and employee turnover should be considered in determining whether to enforce any Board bargaining order.

The Board's decision below ignores its own previous ruling that a bargaining order may not be an appropriate remedy for an employer's refusal to bargain with a certified union. In *St. Regis Paper Company*, 285 NLRB No. 39 (1987), the Board on remand from the First Circuit[3] rescinded its original bargaining order based on the passage of more than four years and "significant changed circumstances" in the employer's operations. The Fourth Circuit has improperly allowed the Board to ignore its prior decision in *St. Regis Paper* as well as the decisions of numerous circuits in refusing to consider compelling changed circumstances.

---

[3] *NLRB v. St. Regis Paper Co.*, 674 F.2d 104 (1st Cir. 1982).

C. *The Fourth Circuit Erroneously Applied the Holding of this Court in* NLRB v. Financial Institution Employees *to Preclude Application of Principles of Equity to Enforcement of Board Bargaining Orders, In Conflict With the Decisions of Other Circuits.*

The Fourth Circuit departed from the well-established doctrine of applying equitable principles to Board bargaining orders. The court's decision incorrectly reads this Court's ruling in *NLRB v. Financial Institution Employees,* 475 U.S. 192 (1986), and is contrary to the holdings of other courts of Appeals. *See NLRB v. Pace Oldsmobile,* 739 F.2d 108 (2d Cir. 1984); *NLRB v. American Cable Systems,* 427 F.2d 446 (5th Cir.); *cert. denied,* 400 U.S. 957 (1970); *Impact Industries v. NLRB,* 847 F.2d 379 (7th Cir. 1988); *NLRB v. Ship Shape Maintenance Co.,* 474 F.2d 434 (D.C. 1972). In conflict with this Court and other courts of appeals, the Fourth Circuit has established an unprecedented and improper standard for reviewing Board enforcement requests.

In *NLRB v. Financial Institution Employees,* this Court addressed whether the Board exceeded its authority when it ruled that all nonunion members of a bargaining unit must be permitted to vote in the union's decision to affiliate with another union. This Court held that "the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union." *Financial Institution Employees,* 475 U.S. at 209. In *dicta,* the Court stated that a union affiliation decision does not automatically raise a question concerning representation. Erroneously applying this language to the case before it, the Fourth Circuit held that changed circumstances such as employee turnover or significant passage of time will affect the Board's bargaining order only if the employer can " 'demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status.' " *National Posters, Inc. v. NLRB,* 885 F.2d 175, 181 (4th Cir. 1989) (*National Posters II*). In

adopting this unwarranted standard, the Fourth Circuit admitted its ruling could not be distinguished from the contrary decisions of other circuits.[4] Until *National Posters II*, equity principles have been consistently applied by this Court and the circuits, including the Fourth Circuit, in reviewing the Board requests for enforcement of bargaining orders. *NLRB v. Pace Oldsmobile*, 739 F.2d 108 (2d Cir. 1984); *NLRB v. Greensboro News & Record*, 843 F.2d 795 (4th Cir. 1988); *NLRB v. Parents and Friends*, 879 F.2d 1442 (7th Cir. 1989). Indeed, this Court has clearly stated its position on the issue:

> The jurisdiction to review rulings of the Labor Relations Board is vested in a court with equity powers, and while the Court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles of judicial action.

Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939).

---

[4] The court dismissed the numerous conflicting decisions of other circuits without analysis: "[W]ithout attempting to further distinguish the decisions of our sister circuits, though, we hold that NPI's challenge must be analyzed under the principles set forth in *Financial Institution Employees, supra*." However, nowhere in the decision is there an *initial* attempt to distinguish those decisions.

CONCLUSION

This Court has not considered whether enforcement of a Board bargaining order is consistent with the purposes of the Act where there are significant changed circumstances, including a significant passage of time from the election or bargaining order and dramatic expansion, turnover or change in the bargaining unit.

The facts of this case are compelling, and are likely to reoccur absent review by this Court. Other unfortunate employers (and their employees) have found themselves similarly situated merely by complying with federal labor law during an election campaign, exercising their right to contest the validity of the union's certification in the courts, enduring lengthy and unexplained delays by the Board, and experiencing a tremendous expansion and turnover in the original voting unit. Protection of the rights of employees requires reversal of the Fourth Circuit's ruling.

In light of the conflict among the circuits, the Board's failure to consistently address this issue and the national importance of this issue, the *amici* respectfully request that the Court issue a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave. N.W.
Suite 1500-North Lobby
Washington, D.C. 20004-1703
(202) 637-3058

FRANCIS T. COLEMAN*
MARK D. NELSON
KECK, MAHIN & CATE
Penthouse
1201 New York Avenue,
N.W.
Washington, D.C. 20005
(202) 789-3400

Attorneys for Amici Curiae

**Counsel of Record*